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PRODUCTION OF BOOKS AND PAPERS—CONSTITUTIONALITY OF ACT OF 1874.—The validity of Section 5 of the Revised Act of June 22, 1874 (18 Stat. 187), has lately been passed upon by two able federal district judges, Judge Blatchford of the Southern District of New York (United States v. Hughes, Amer. Law Times Reports for July), and Judge Dyer of the Eastern District of Wisconsin (United States v. Three Tons of Coal, Etc., 21 Int. Rev. Rec. 251). Judge Blatchford holds the section unconstitutional, but Judge Dyer is of a different opinion. It reads as follows:

SEC. 5. That in all suits and proceedings other than criminal, arising under any of the revenue laws of the United States, the attorney representing the government, whenever in his belief any business book, invoice, or paper belonging to or under the control of the defendant or claimant, will tend to prove any allegation made by the United States, may make a written motion particularly describing such book, invoice, or paper, and setting forth the allegation which he expects to prove; and thereupon the court in which suit or proceeding is pending may, at its discretion, issue a notice to the defendant or claimant to produce such book, invoice, or paper in court, at a day and hour to be specified in said notice, which, together with a copy of said motion, shall be served formally on the defendant or claimant by the United States marshal, by delivering to him a certified copy thereof, or otherwise serving the same as original notices of suit in the same court are served; and if the defendant or claimant shall fail or refuse to produce such book, invoice, or paper, in obedience to such notice, the allegations stated in the said motion shall be taken as confessed, unless his failure or refusal to produce the same shall be explained to the satisfaction of the court. And if produced, the said attorney shall be permitted under the direction of the court to make examination (at which examination the defendant or claimant, or his agent, may be present) of such entries in said book, invoice, or paper, as relate to or tend to prove the allegation aforesaid, and may offer the same in evidence on behalf of the United States; but the owner of said books and papers, his agent, or attorney, shall have, subject to the order of the court, the custody of them, except pending their examination in court as aforesaid.

A Question for Authors.

The question has frequently, no doubt, puzzled authors of law books, how far the facts of each case should be stated, and how far the reasoning of the court in each instance should be set forth. The question is brought to mind by a review in the Solicitor's Journal, of a book entitled "A Digest of Reported Cases relating to the Law and Practice of Letters Patent for Inventions, decided from the Statute of Monopolies to the Present Time, by Clement Higgins, M. A., F. C. S., Barrister-at-Law," published by the Butterworths of London, in which the reviewer makes the following observations:

In perhaps the majority of cases we have an abstract, but in far too many we are presented with the *ipsissima verba* of judgments. Take the case at p. 53 of Ralston v. Smith (11 H. L. Cas. 223). Our author commences, neatly enough—

"The discovery of one particular use of a known machine, although more advantageous than that formerly known, is not the subject of a patent."

We then have the facts, which appear to be adequately stated. Afterwards, instead of the substance of the decision, we have two long extracts from the judgments of the Lord Chancellor (name not given) and Lord Cranworth, (who begins thus):—

"I quite agree with what was said by Mr. Grove, and it could not possibly be disputed by any gentleman at the bar, that it is not every useful discovery," etc.

Similar in Jones v. Berger (at p. 416), we find Maule, J., saying that "it might well be as my Brother Bompas argued forcibly," etc. Again *In re* Morgan's Patent (at p. 264) we read:

"Lord Brougham, in delivering judgment, said, 'It is by no means the course of their lordships, as has been frequently said, and by myself lately, in giving the judgment of the court in a recent case—it is by no means their course,'" etc.

We cannot think that the insertion of small talk of this kind is consistent with the general design of the book.

We can well understand that in a digest of English cases, collected for the use of English lawyers, extended quotations from the observations of the judges in delivering their judgments, would be superfluous. The reason is that English lawyers have in most cases (we suppose) access to the original volumes of reports; and to stuff a digest with the dicta, particularly with the "small talk" of the judges, would be merely to duplicate matter already in their possession. It is obvious, that when a digest has given a succinct statement of the points of law ruled in the cases collected, or, where the points cannot best be stated in the abstract, of the facts of each case, and the conclusion of the court on these facts, its chief function is accomplished. If it undertakes to give the reasons on which each decision rests, its author is open to the impeachment of being guilty of the sin of "padding," that is, of swelling its bulk with matter which might have been omitted. The profession, now overtasked by the multiplication of law books, cry out against books made in this manner.

But to what is here said there are important exceptions. Suppose, for instance, an author addresses himself to the task of making a digest of the decisions of a court whose reports do not exceed twenty-five volumes. He may here perform a task more acceptable to the persons for whose use his book is intended, by making his abstracts of the questions ruled sufficiently full to include a brief statement of the *grounds* upon which each case rests. This was done by Return J. Meigs, Esq., in his Tennessee Digest, published in 1850, which included the first twenty-six volumes of the reports of that state, and which was so acceptable to the profession that it was constantly quoted to the courts in lieu of the reports themselves, and was frequently so quoted by the judges of the supreme court in their opinions. Dane's abridgement, a work of great usefulness in its day, seems to have been produced on a similar plan, as was also Morrison's Dictionary, an abridgement of Scotch reports, which seems to have superseded for the most part the reports themselves.

These illustrations serve to show that books of the class named may be in a high degree useful; but they do not answer the particular question which the writer has in mind. Suppose a person sets out to write a book for American lawyers, upon a subject which is founded exclusively upon statutory enactments. Suppose these statutes, though founded in a common policy and having a common end in view, differ somewhat in different states. Suppose the judicial decisions expounding these statutes have grown up isolatedly, so to speak, that is, the decisions of the courts of one state have not been looked to to any considerable extent by the courts of the other states in determining the meaning of their own corresponding statute with reference to a similar state of facts, and that the decisions are hence very conflicting. Suppose the total

number of decisions does not exceed one thousand, and that it is therefore possible to exhibit within the compass of an ordinary volume, with considerable fullness, the *reasons* which the various courts have given for the conclusions which they have reached. With such a task and such materials before him, what course should such an author pursue, in order to exhibit in the most satisfactory manner the course of the adjudications with reference to this body of statute law? It is obvious that the particular clause of the statute passed upon in each case must be stated, and that the exposition put upon it in each case must be distinctly exhibited. But, considering the fact that the great majority of the persons for whose use such a book is intended have access to but small libraries of reports, ought he not to bring each case fully to the surface, setting out in the language of the court the grounds in on which their judgment is based? These views are thrown out as enquiries for the purpose of elicting the opinions of such of our readers as may have given attention to the subject.

Oral Arguments before Courts of Error.

At the recent annual meeting of the Iowa State Bar Association, the following resolutions were adopted:

1. *Resolved*, That the respective functions of the bench and the bar in the administration of justice, are so connected with, and dependent upon each other, as to require for their harmonious and salutary working, the maintenance of cordial and intimate relations, and of constant and personal intercourse between the members of the bar, and the occupants of the bench; that this is especially true of the relations between the bar and the state court of final resort, and that any system of practice which tends to break or impair the bond of union which ought to subsist between them, and to build up a barrier between the bench and the bar, is, in the opinion of this association, highly injurious to the interests of both, as well as detrimental to the administration of the law.

2. *Resolved*, That the supreme court of the state, standing at the head of our judicial system, and constituting the final and authoritative exponent of our law, should afford to the entire bar of the state, at once a school for the cultivation and an arena for the exercise of the highest style of forensic discussion. That whatever learning and ability the ranks of the profession can boast should find at the practice of its bar, at once the opportunity and the stimulus to its full exercise, and the field in which to reap its merited reward.

3. *Resolved*, That the whole history of the common law on both sides of the Atlantic, demonstrates the pre-eminent value of the public oral argument at the bar of the court as a means for the cultivation of the highest excellence alike in the advocate and the judge, and consequently for promoting the pure and enlightened administration of justice.

4. *Resolved*, That in view of the foregoing considerations, this association regards the present system of practice in the supreme court of this state, by which the argument of causes by counsel at the bar of the court is almost entirely done away with, as highly detrimental alike to the court, the bar, the jurisprudence of the state, and the interests of public justice, and as calling loudly for reform.

5. *Resolved*, That it is the imperative duty of the members of the bar to assist the supreme court in removing obstacles to a return to the ancient and time-honored practice of argument orally at the bar, by using their influence to discourage the bringing of frivolous and unfounded appeals, and the consequent consumption of the time of the court in investigating and deciding cases which ought never to have been brought before them.

The views embodied in these resolutions are strongly combated by a writer in the July number of the Western Jurist, who forcibly urges that oral arguments are not the best; and there is a good deal of sense in what he says. He denies that the Supreme Court of Iowa should be made a *school* or *arena* for the cultivation of forensic eloquence; and he is undoubtedly right in this. Courts of justice are organized for no such purpose. They are instituted for the speedy and correct dispensation of justice, and whatever system conduces most directly to this end ought to be adopted. The people want their lawsuits decided speedily and justly, and they do not keep up an expensive judicial machinery as a training-school for advocates.

The writer alluded to is undoubtedly right, when he says of oral argument, "It tends to diffuseness, to hasty and inconsiderately attempted expositions, to extempore thought and act, and by its great attractiveness and the romance of its associations, has a tendency to turn, especially the young mind, from the profound study of the law. This is well illustrated in the fact that among Roman advocates, a knowledge of the law was held to be a thing of secondary importance. Mark Antony, one of the most successful of his class even ridiculed the study of the law. And there, as is the tendency in all cases, where the advocate has full privilege, he became a mere actor. Cicero commenting on these, himself says, that the best thought is obtained by writing, but that the practice is very unusual on account of the great labor."

It is a matter of common observation that the most brilliant advocates are not the most profound lawyers. It may even be doubted whether the existence of brilliant advocates has not been a curse rather than a blessing to society. While it is true that the powers of such men have found their greatest opportunities in defending the weak against the strong, and in supporting the rights of the subject or citizen against the tyranny of his sovereign or government; yet far more frequently—nay almost habitually—we find them arrayed on the side of the criminal classes, overmastering the reason of jurors, defeating justice, and turning their unworthy clients loose to prey again upon society. The powers of brilliant men of this character are so often exerted in this way, that many people come to regard them as being substantially *particeps criminis* with, or as a species of accessories after the fact to, the criminal classes. We think, then, that candid doubts may well exist whether the cultivation of forensic eloquence is not deleterious rather than beneficial to society.

At all events, the administration of justice is not to be promoted by such displays, in courts where pure questions of law are to be argued. With reference to arguments before such tribunals the advice which Mr. Justice Story is said to have given to a young lawyer, and which some one paraphrased into the verses on which we practiced when children in our school readers, is extremely appropriate:

> Whene'er you speak, remember, every cause
> Stands not on eloquence, but stands on laws;
> Nor deal in pompous phrase, nor e'er suppose
> Poetic flights belong to reasoning prose.
> Loose declamation may deceive the crowd,
> And seem more striking as it grows more loud;
> But sober sense rejects it with disdain,
> And naught but empty noise, and weak as vain.

Whilst entertaining these impressions, we believe that every cause should be *argued* before the full court. This should not, however, dispense with the necessity of a printed argument or brief, embodying fully the grounds and authorities on which the party relies. If a counselor, in making his oral argument reads from his printed argument, it might be well, as is done in some courts, to require him to confine himself to it. If he argues orally, he should be limited to a reasonable amount of time, consistent with the amount of business before the court. We think we do not exaggerate when we say that every suitor has a *right to be heard*. At the same

time we believe that the advantage of having a cause argued before them is one which judges can not, for their own credit, afford to put aside.

1. As to the right to be heard. An advocate who "submits" his cause on brief, can never feel an assurance that it will receive the attention of more than one judge. The "Inner Temple" practice of a bench of judges, is something which members of the bar can not look into, and as to which dictation from the bar would no doubt be considered impertinent. There is abundant reason to believe that in some courts, causes submitted do not receive the united attention of the judges, and that in many cases the judge to whom the record is assigned writes the opinion and files it as the opinion of the court, without previously consulting with the other judges upon the case. Where such a loose and reprehensible practice prevails, the counselor who has argued his cause before *the whole court*, feels at least the assurance that he has been *heard by the judge who will decide it.*

2. As to the advantages of oral argument to the judges themselves. It must undoubtedly be true that the opportunity to interrogate counsel, may frequently lead to a better understanding of the nature of the cause, and may clear up many doubts. The English reports show that even in the House of Lords the argument of causes frequently assumes the character of a running oral debate between court and counsel. In this way a great many specious shams are pricked and exploded, a great deal of useless talk is cut off; the judges arrive at a better understanding of the cause, and counsel are maintained in habits of honesty which they are liable to fall from under the dark-lantern system of "submitting" causes on briefs, which are sometimes concocted in a spirit of deceit and falsehood, and which are very often unintelligible.

Our Federal Judiciary.

ORGANIZATION UNDER THE JUDICIARY ACT OF 1879—AN EXAMINATION OF THE MERITS OF THE RECENT ACTS OF CONGRESS EXTENDING THE JURISDICTION OF THE COURTS, WITH SOME SUGGESTIONS AS TO THE NECESITY OF FURTHER LEGISLATION TO REMEDY EVILS.

The necessity of a judiciary department to every civilized government, is as apparent as is that of a legislative or executive department. And in our complex system of federal and state governments, it was just as necessary in establishing the system by the federal constitution, to define and limit the jurisdiction and powers of the federal judiciary, as to declare and limit the powers of Congress and the President.

But the government was an experiment, and it was regarded as both wise and prudent by the framers of the constitution, rather to fix the *boundaries* of, than to define the construction and jurisdiction of the several courts, for which provision was made in the instrument, leaving Congress to perfect the system by establishing the courts, and defining their jurisdiction within the fixed boundaries, so as best to subserve the purposes of the government, as indicated by the constitution; leaving in Congress the power to make such changes, as by the light of experience should seem necessary and expedient.

The ideal of a federal judiciary as found in the constitution, took shape and form by the act of Congress of 1789, known as "*The Judiciary Act,*" and so designated by the courts and the bar ever since.

There seems a striking peculiarity in this act of Congress. For while Congress itself had from the very beginning, gone to the very limit of the powers conferred by the constitution, and while this example seems to have been followed by the executive, yet, in defining and limiting the jurisdiction of the courts, Congress seems to have acted upon the theory that the whole jurisdiction, authorized by the constitution, was not necessary to the harmonious working of the system. The result was, only a part of the jurisdiction authorized by the constitution was conferred on the courts by Congress. The remnant was reserved.

It will be observed that by the provisions of the act, the government provided itself with the means of enforcing its own laws, of collecting its own revenues and other dues, of carrying out the provisions of the constitution in the exercise of the admiralty jurisdiction. That it carefully preserved the supremacy of its constitution, laws, and treaties within their spheres, by its power of revision of the decisions of the state courts, and at the same time, made ample provision for impartial trials for the representatives of foreign governments, for aliens, for citizens of different states, under circumstances wherein there might be danger of partiality in the local state courts, for the settlement of controversies between states, or between a state and citizens of another state or aliens, and between citizens claiming title under grants from different states.

And while the system was manifestly based upon a conservative theory of the relation of the federal and state governments, still the act contains ample provision against the encroachments of state governments. Indeed, it might perhaps be safely said, that it contains all the elements of self-vindication, which are consistent with the integrity and proper independence of the state governments.

Of course this last suggestion is trenching upon questions we do not propose to discuss. Though it will not be seriously controverted, perhaps, that the theory of the relation of the federal and state governments was, that the judicial protection of the life, liberty and property of the citizen, should be left to the state courts. The exceptions being only cases, under the then contemplated jealousies which might obtain between citizens of different states, and between aliens and citizens; in regard to which a notion prevailed that the federal tribunals would be more impartial, and therefore an optional resort to them was allowed. But with the light of experience it is very questionable whether this danger of partiality of the state tribunals to the citizens of their own states, was not greatly overrated by our forefathers.

The greatest eulogy that we can pronounce upon the federal judiciary system of 1789, is, that it remained substantially unchanged for three-quarters of a century. The changes that occurred prior to the late rebellion, did not materially change the system, or affect the jurisdiction of the courts.

There is, however, a feature of the system which at this day would seem palpably unjust, but which has become more so since the organization of the circuit court under the original act, by very material changes in its organization. It is this: the *minimum* sum which gives jurisdiction to the circuit

court, under the act in actions at law and suits in equity, in the largest class of cases litigated in that court, is $500, while the *minimum* which gives jurisdiction to the supreme court on appeal or writ of error, is $2,000. Thus depriving the suitor of an appeal or writ of error in all cases where the sum litigated ranges between these two amounts.

This provision, compared with the mode of administering justice either in England or in the state courts, is quite unusual. It will be observed that one party litigant in every case is brought to litigate his case in the federal court involuntarily, and in most cases in practice, upon the theory that there is a justification for it, based upon the prejudice existing against citizens non-resident of the state in which the litigation is had, which will prevent justice being administered; a notion, by the way, which experience has shown to have but slight foundation.

Now we enquire, is it not fair and right—is it not incumbent upon the government, to furnish both parties with the means of obtaining not only a fair and impartial trial, but the same means of redress for erroneous rulings upon questions of law, by *nisi prius* judges, as are furnished by the state courts?

If, therefore, $500 is the proper limit to justify the circuit court to try causes originally, the defeated party ought to have the right of review in all cases. If the supreme court is too august a body to be occupied in the consideration of cases involving such small amounts, or if such consideration is impracticable under the present organization of the court, then those cases too inconsiderable to justify the same, should be entirely excluded from the jurisdiction of the federal courts, or some other less important tribunal should be constituted to hear appeals and writs of error in such cases.

The inconvenience to parties litigant, growing out of the denial of the right of appeal or writ of error in cases where it *is* denied, has been greatly enhanced since the date of the judiciary act. Then the circuit court was composed of two judges of the supreme court, and the district judge, and no court could be held without the presence of one supreme judge; while in the circuit court as now constituted, the district judge alone can hold the circuit court, and as a matter of history, in those cases which are too insignificant to merit the revision of the supreme court upon appeal or writ of error, the *district* judge is the *sole* judge.

In this remark we mean no disparagement to the district judges. They are most, if not all of them, men of learning and ability, and for the purposes of this enquiry, we admit that they are as well or better qualified than *nisi prius* judges in any of the states of the Union, or in the mother country.

The complaint is, that it is unjust to compel parties litigant to be content with the final determination of important legal controversies, involving important pecuniary interests, *by a single judge* upon a trial at *nisi prius*.

And that in this respect the federal judiciary system is unjust, there can be little controversy; and compared with the judicial systems of all other governments where the English language and the English common law prevail, it is unparallelled.

The spectacle is a novel one; we profess to be the freest people in the world; we constantly assert that our government protects the lives, liberty and property of our citizens better than any government in the world; and yet the federal government compels parties litigant in its courts, in law and equity cases to accept the decision of a single judge at *nisi prius*, at a single trial, as the final determination of their rights, in all cases excepting in those where the amount in controversy exceeds the value of the entire possessions of nine out of ten of all the population. This is emphatically true of the recent act changing the jurisdiction of the supreme court, about which we will speak presently.

While on the other hand, in the mother country *whose yoke we threw off* on account of her oppressions; in this *British monarchy* which we teach our children to contemn, we find anywhere from three to twelve of the most able and highly cultured judges of the realm, sitting in appellate courts and listening to able and learned arguments, and delivering learned opinions upon questions of law, in cases where the amounts involved are only a few shillings, but where important legal principles are involved affecting the liberty or property of the subject. And so is the administration of justice in all of the state courts. In some of the states the right of resort to the court of errors or appeals is without limitation, while in others, and perhaps a majority of them, the right is limited by amount, but is allowed in all cases where the amount involved exceeds a very inconsiderable sum.

We are aware that this seeming injustice is alleged to be the necessary result of the magnitude of the country, and the accumulation of the business of the courts. But it is quite clear that this is not even a valid excuse.

It is true that at the time when the act of 1789 was passed, there was perhaps a partial necessity for the limit; or at least to have allowed an appeal or writ of error for any small sum would have been ruinous to parties litigant, because of the great difficulty in reaching the capital. But if that difficulty ever justified a limitation of the supreme court jurisdiction to a sum higher than that fixed as a limitation to that of the circuit court, which is questioned, still no such an excuse now exists. The facilities for travel, and the simplicity of the supreme court practice have obviated all such difficulties.

The cases where the complaint arises, are those in which the jurisdiction is concurrent with the state courts, and there is no great pressing necessity for the assumption of the jurisdiction by the federal government. Indeed it is a great wrong to assume jurisdiction, and withdraw cases from the state courts, without giving the suitors the same facilities for the administration of justice as they would have in the state courts. And it were far better as our federal circuit court is now constituted, where the *circuit* judge, who, in all places but the larger cities, is the *district* judge, is sole and final arbiter of more than half the cases he tries, to raise the *minimum* amount which shall give jurisdiction to the circuit court, and lower that which gives a right to review on error or appeal, until they meet, than to have the present condition of things.

The evil does not stop at the injustice to the particular suitor either, in being deprived of the right of appeal. It results in a want of uniformity of decisions. And in a certain tendency by the judges, in the determination of cases, not subject to review, to decide according to the "*very right of the case*," as seems to them, and often without that regard to precedent which is necessary to preserve uniformity in judicial decisions.

These peculiarities do not inhere in federal judges alone,

but they are such as are always found more or less to affect courts whose judgments are not subject to review.

As has already been observed, there was little change in the jurisdiction conferred upon the federal courts, and exercised by them till after the commencement of the late rebellion. The rebellion developed the fact that the exercise of the ordinary powers of the government, as contemplated by its framers, in the modes which had been adopted in times of peace, or even in times of foreign wars, were inadequate to its preservation and perpetuation against an organized section of the country, backed by the local or state governments. The result was the assumption, both by Congress and the executive, of powers which would not under other circumstances have been regarded as legitimate.

The rebellion being regarded by the wisest of our statesmen as the overgrowth of the heresy of "*states rights*," with its necessary concomitant, the doctrine of secession, it was a part of the normal growth of public sentiment, that the fear of absorption by the general government had induced the framers of our constitution to make the general government too weak.

A very natural result of this sentiment, was to induce Congress in its attempts to strengthen the government, to confer upon the federal courts, from time to time, the reserved jurisdiction which it had not been thought fit originally to confer. Thus we see, that commencing in 1864, before the close of rebellion, and culminating in March, 1875, at the very close of the last session, Congress has exhausted its power; and has conferred upon the federal courts all the jurisdiction authorized by the constitution.

Prominent among these acts enlarging the jurisdiction of the court, is the bankrupt act of 1867. These additions, with the increase of jurisdiction under the several amendments to the constitution, the additional litigation resulting from our internal revenue system, which is of recent origin, with the greater demands upon the courts from the increase of population, will render it wholly impraticable for the federal courts as now organized to do the work thrown upon them.

The augmentation of force by the addition of separate circuit judges, has not up to the close of the last year, independently of the enlargement of the jurisdiction by the act of 1875, compensated for the increase of business in the courts. The dockets of all the courts are crowded. The available judicial force is everywhere inadequate to the demands upon it. Cases involving large amounts are delayed, until the delay becomes absolutely ruinous to suitors. And the old traditional prejudices against the English Court of Chancery will soon be revived against our federal courts. So that when the accumulations which must result from last year's legislation are added, it is quite apparent that Congress must recede and abandon some of the accumulated jurisdiction, or the courts must be reconstructed, and the system must be materially changed.

It is a most singular fact that Congress should pass an act restricting the rights of review upon writ of error, or appeal to the supreme court, in cases where the sum does not exceed $5,000, for the purpose of relieving the supreme court docket, which is at best but a temporary expedient, and which renders the federal courts very imperfect tribunals for the administration of justice, as we have endeavored to show; and that at the very same term it should pass an act which increases the business, very largely, in circuit courts now already overcrowded, and which will counteract in part, if not wholly, the effect of the other act intended for the relief of the supreme court from the present pressure.

It may be proper to enquire a moment, as to the necessity of this change enlarging the jurisdiction of the federal courts, and to see whether there is any necessity for it, and indeed whether it is not rather an evil than a benefit.

It would carry this article beyond its legitimate purpose, to discuss in detail all the changes whereby the jurisdiction of the circuit court has been enlarged, but it may suffice to mention a few.

If there is any justification at all for the jurisdiction of the federal circuit court, based upon the citizenship of the suitors, it is eminently fit that a citizen of one state, having a claim against a citizen of another state where the suit is to be brought, should have a right to bring his suit in the federal court; because the state tribunals might be partial to their own citizens, and in such case there is no hardship that he should make his election before he brings his suit. This is according to the act of 1789.

But there is perceptibly little claim on the part of the citizen of one state, suing the citizen of another state within the limits of a third state, to invoke the jurisdiction of the federal court. Yet this is authorized by one of the provisions of the act of 1875.

The recent amendments of 1866 and 1867 have extended the right of election by transfer, upon affidavit of local prejudice at any stage. And while there may be benefits growing out of these changes, yet they are usually resorted to for purposes of delay and vexation, and generally in practice subserve these purposes far more than they do the impartial administration of justice.

Again, when a citizen of one state is sued in the state court of another state, by a citizen of a state in which the plaintiff resides; it would be certainly fair to protect the defendant from any local prejudice, by permitting him, upon entering his appearance, to transfer his case to the federal courts, as under the act of 1789 he might do.

But we can see no benefit in extending this right to him, so as to permit him upon affidavit to exercise the right of transfer at *any time*; nor is there any excuse for a transfer to protect either party from local prejudice, where the parties are both citizens of different states from the one in which the suit is brought. And *a fortiori* is there no justification for permitting a citizen defendant to be relieved from the danger of prejudice, in a case between him and a citizen of another state, by permitting him to transfer his case from the state court of his own state to the federal court.

And yet all these propositions find sanction in the recent acts of Congress. It will be observed, too, that in all these cases, one of the parties litigant either voluntarily or involuntarily sacrifices the right of review upon writ of error or appeal, where the amount in controversy does not exceed $5,000.

The truth is, that a careful examination of these modern acts of Congress enlarging the jurisdiction of the circuit court, will reveal the fact that they are absolutely unnecessary, and while they largely increase the business of the circuit and supreme courts, they might well be repealed, and the jurisdiction be limited as under the acts of 1789, without injury to the public.

But as the tendencies are all in favor of going forward, rather than backward, and as the present system is imperfect, as it is, it will be absolutely necessary that Congress shall take immediate steps for the relief of the several courts, from the pressure caused by the combined effect of the growth and development of all the material interests of the country, and these enlargements of the jurisdiction by the recent acts of Congress.

The act of the last session changing the limitation upon the jurisdiction of the supreme court upon appeal and writ of error, from $2,000 to $5,000, was intended to relieve the supreme court docket. But besides its being but a temporary expedient, it involves the inconveniences which have already been discussed, of depriving half the suitors in the circuit court of anything but a simple trial at *nisi prius* before a single judge without any right of appeal.

This latter evil or inconvenience ought by some means to be remedied. It will scarcely be tolerated for any considerable length of time. Indeed, it seems to have been adopted as a mere expedient for relief, without much reflection as to the effect of it.

A writer in the American Law Review, for July, discusses the reforms which will render the supreme court adequate to the increasing demands upon it, and which, if carried out, would perhaps justify the reduction of the sum necessary to give jurisdiction to that court. The article is a thoughtful presentation of what seems a well-considered plan. But as it seems a great innovation upon the original structure of the court, it would be likely, notwithstanding all the considerations which seem to commend it, to be difficult to procure the adoption of it, or any similar plan by Congress.

For the benefit of those who have not read the article, it is proper to state, that the plan of the reform scheme is to have several separate sessions of the court, at several separate places, and let the judges hold these sessions, say *three judges* together. These sessions to be but sub-divisions of the court, the whole number, which under the plan may be increased to meet the demand of the country, still continuing to constitute the supreme court, and to have jurisdiction to hear certain questions before all the judges, upon a rehearing, or otherwise, so that uniformity may be preserved.

But, taking into consideration the improbability of the adoption of this system, and the doubt whether it would meet the necessities of the case, it seems clear that there are other reforms which are practicable, which ought to be adopted.

There is no necessity longer to have the complication of a district and circuit court.

But as it is but a change of name to transfer the business and jurisdiction of the district court to the circuit court, and call the *district* judges *circuit* judges, unification would be the only advantage in such a change; which, though of much value in legal proceedings, would scarcely justify contention to effect the adoption of such a change.

But assuming that the jurisdiction and construction of the courts now in existence shall continue as at present, with only such additions to the number of judges as are necessary to provide sufficient force to perform the work, it is very clear that an *intermediate* court is indispensable.

The advantages of such a court would be to furnish a prompt, easy and inexpensive mode of hearing cases upon appeal or error, free from the local prejudice to which *nisi prius* courts are subject, with the advantage of several judges, with the necessary time and means of careful examination, which would so frequently result in a final determination of causes, as to lighten the work of the supreme court, which of course would have a power of review by appeal or writ of error from or to the intermediate court, under certain limitations, as at present it has in cases tried and determined in the circuit court.

Every experienced lawyer knows that trials had at *nisi prius* often result very unsatisfactorily, especially, as far as the determination of questions of law is concerned, and more especially so where judges are pressing business to keep down expenses. Where the courts are held by non-resident judges, where the business of the court is managed by a small number of lawyers (which is always the case in the federal courts, except in the centers of population), such trials afford neither the time nor the opportunity either for court or counsel to examine, discuss and determine important legal questions.

And, under the most favorable circumstances, experience proves that the determination of a single judge is frequently unsatisfactory both to parties and to counsel.

While, when a case is presented upon error or appeal, more time and better opportunities are given for its argument, consideration and determination.

And the independent opinions of even *three* judges learned in the law, concurring in a decision, usually so settles the minds of the defeated party and counsel as to put an end to the controversy. And this would be the result in a majority of cases if such a court were provided.

But the question arises how shall this court be constituted?

Since the commencement of this artice, the CENTRAL LAW JOURNAL of the 6th of August has appeared, in which is published a communication from Mr. J. M. McCorkle, touching the delay of business in the supreme court, in which a plan of an intermediate court is suggested. The plan is for the court to be composed of the justice of the supreme court assigned to a circuit, with the circuit judge and all the district judges within the circuit, and the sessions to be held in each district. We suggest that this, perhaps, would be a good plan, provided that a smaller number, say the justice of the supreme court, the judge of the circuit court, and three district judges should constitute a quorum, and that the judge who tried the case at *nisi prius* should in no case sit at the hearing on error or appeal.

And we suggest, also, that with a court so constituted, it might not be necessary to hold terms in every district. For instance, where there are more than one district in a state, one session for two or more districts might suffice. But these are matters of mere detail.

Mr. McCorkle urges the organization of an intermediate court for the relief which it would afford to the supreme court docket. But its necessity may be more properly urged, not only for this purpose, but on account of the necessity of some provision for the relief of those suitors who are forced into the Federal courts to litigate sums involving all they are worth, and are compelled to be content with a *single* trial before a *single* judge, and are denied the right of review, a right not denied the meanest citizen or subject of any other government where the English language is spoken, or the common law prevails.

And the attention of *congressmen* is respectfully but earn-

estly called to this gross violation of the rights of the citizen, and they are earnestly urged to see that it be remedied by the appropriate legislation.

It is believed that the constitution of an intermediate appellate court, composed as before indicated, for the hearing upon appeal or writ of error of all cases arising in the circuit court, with the right of review by the supreme court, of the decisions of the intermediate court in the same, or in like manner as the decisions of the circuit court are now reviewed, with such limitations as the constitution of the new court should suggest, would alike relieve the supreme court and meet the want of a cheap and convenient appeal in those cases where no appeal is now allowed. A. I.

Railway Negligence — Liability for frightening Horse by Steam Whistle.

PHILADELPHIA, WILMINGTON & BALTIMORE R. R. CO. v. STINGER.*

Supreme Court of Pennsylvania, May 10, 1873.

The plaintiff was driving a horse known to be afraid of locomotives, upon a road parallel and contiguous to defendants' railroad. The engineer of an approaching train blew the whistle of the locomotive once or twice, which caused the horse to run off, and the plaintiff was thereby thrown from the vehicle and injured. *Held* (reversing the judgment of the court below), that the question whether the use of the whistle was negligent was for the jury, but not whether any use thereof was such. *Held*, further, that the use of a horse known to be afraid of locomotives in the vicinity of a railroad, was contributory negligence.

Error to the District Court of Philadelphia County.

This was an action on the case for negligence, brought by Stinger against the plaintiff in error. The narr. contained a single count, averring that the plaintiff was on September 1, 1871, lawfully driving his horse and wagon along Gray's Ferry Road, by the side of which a part of defendants' railroad is situated; that then and there the defendants so carelessly and improperly propelled a locomotive and train of cars along their said road, and made such great noise and shrieks by blowing the whistle of the said locomotive, that, by the defendants' carelessness, the plaintiff's horse was frightened and ran away, and the plaintiff was thrown from his wagon and greatly injured. Plea, "Not guilty."

The accident occurred upon Gray's Ferry Road, at a point east of Gray's Ferry Bridge, which crosses the Schuylkill River some distance beyond. The locality and character of the road, where the accident happened, are fully described below in the opinion of the supreme court. It appeared in evidence that it was the rule of the company to have the bell upon the engine rung until the engine had passed the thickly built-up portion of the town, in order to warn persons crossing the railroad track. It further appeared, however, that the whistle was alone used for this purpose upon reaching the more thinly settled and outlying parts of the town. It was proved also that the whistle was always used to notify the bridge tender and travellers upon the Gray's Ferry Bridge, which was a draw-bridge, of the approaching trains from the city, to prevent any accident thereon. For these purposes the whistle was usually sounded somewhere near 30th street. Many trains passed along the road every day, and this was the daily practice. After the railroad passed 28th street the locality was rural, and there was but few houses. It appeared that the company had, since the accident, substituted the bell for the whistle at this place; but it likewise appeared, as a reason for the change, that that part of the city was, at the time of the trial, much more thickly built up than at the time of the accident.

*The excellent report of this case which we here present, giving the opinion of the court in full, is from the weekly notes of cases, published by Messrs. Kay & Bro., of Philadelphia.

Stinger, the plaintiff below, was a gardener living on 33d street, below Gray's Ferry Road. On the day of the accident he was returning from market in the city, and going west along Gray's Ferry Road, as he did every day, when at a point between 30th and 31st street, his horse became frightened by the whistle or whistles of the locomotive of a passenger train, coming up behind him and ran away. The plaintiff jumped out, as he stated, to get the horse's head, but in so doing fell under the wagon and sustained certain injuries. The plaintiff testified that there were two "blasts" between 30th and 31st streets; that his horse started to run at the first one, but he checked him, and then the whistle sounded again and his horse ran off. On the other hand, a number of defendants' witnesses, including four employees on this train, testified that the whistle was sounded but once. The plaintiff testified that his horse was always afraid when a whistle sounded, that he had driven it on that road daily for two or three months before, and upon hearing a train approach, he always got out and stood by the horse's head.

The engineer in charge of the locomotive testified that he had not seen any particular wagon when he blew the whistle, but that he had waited till he got to a place clear of carriages before blowing. The learned Judge below (LYND, J.) charged that "negligence consists in doing that which a man of ordinary caution would not do under the circumstances;" and left it to the jury to decide ["whether the engineer, in sounding the steam whistle, under the circumstances, did that which a man of ordinary prudence and consideration for his fellows would not have done."] He further charged: ["You will take into consideration all the circumstances—what a steam whistle is, what a noise it makes, the alleged nearness of the wagon and the alleged excited condition of the horse. If the horse was really running away and the locomotive was really overhauling him and within fifty feet and then blew, you will consider if the engineer did what a prudent and careful man would have done, when he blew the whistle."]

In reply to defendants' *second point*; "that the defendants, being authorized to use steam engines upon their railroad along Gray's Ferry Road, etc., are not responsible for accidents arising from fright to horses occasioned by the noises incident to the employment of their engines," the court charged that ["the defendants were not responsible for accidents arising from fright to horses occasioned by noises *necessarily* incident to the *careful* employment of the engines. You will consider if the blowing of a whistle is a *necessary* incident of the movement of trains—I leave it to you to say as a question of fact. You will consider whether the train could have been moved without a steam whistle as a matter of fact."]

To the defendants *third point*; that unless the evidence shows that the defendants were exercising their right to use and move their engine in an extraordinary way, and without due and reasonable care, no negligence can be imputed to them, and they are not liable to the plaintiff; the court answered: ["I affirm that just as it was written, but it still comes back to the starting point, whether the blowing the whistle *there* was not using the engine in an extraordinary way."]

In reply to the *fourth point*, that there was no evidence of negligence, the court [declined so to charge, and left that question to the jury.]

Defendants' *sixth point* was that if the plaintiff knew that his horse was easily frightened by locomotives, it was negligence on his part to drive such a horse along Gray's Ferry Road in close proximity to the railroad; and if the plaintiff's horse while being so driven became frightened, he can not recover. Answer. ["I decline so to charge you. The law will not banish horses from highways because locomotives cross or traverse them. The effect of a man having a horse liable to fright from a locomotive would be to require him to use a greater degree of care. It would impose upon him the duty not to bring the horse in contact with an engine unnecessarily; but here there was no other road. The law does not

compel a man to go out of his road a mile or more, even to avoid such danger. He must be more watchful. If he approach a railroad with such a horse, he ought to look out for trains. If he saw a train it would be his duty to keep out of the way, or, if overtaken on the route and he should find that the locomotive was upon him, he should get out and hold the horse by his head; but it is not contributory negligence itself to go there with such a horse. It did impose a greater degree of caution."]

Verdict for plaintiff and judgment thereon. The defendant took this writ of error. The charges and answers inclosed in brackets were assigned for error.

James E. Gowen (with whom was *Thomas Hart, Jr.*), for plaintiffs in error.

The most material error was in leaving it to the jury to say whether the blowing of a steam-whistle was a necessary incident to the moving of trains, and to find for the plaintiff if they should think that the train upon this road could run without *any whistling whatever*. An omision to whistle would have been negligence.

As to the use of steam-whistles, see Whart. on Negl. sec. 836, 898; Sh. & Redf. on Negl. sec. 466 and n. 1; Burton v. P. W. and B. R. R. Co., 4 Harrington, 252; Bordentown & S. Amb. Turnp. Co. v. C. and A. R. R. Co., 2 Harrison, 314; King v. Pease, 4 B. & Ad. 30.

There was no evidence of negligence to go to the jury.

Dropsie, contra.

The charge called the attention of the jury to the circumstances of the case, and did not authorize them to condemn the use of steam-whistles generally. The word "*there*" in the answer to the defendants' third point refers to the particular time, place, and occasion of the accident. Negligence is a question of fact. Huyett v. Phila. and Read. R. R. Co., 11 Harris, 374; McCully v. Clarke, 4 Wright, 408; Lack. and Bloomsburg R. R. Co. v. Doak, 2 P. F. Smith, 31; Tr. and Bristol Turnp. Co. v. Phila. and Trenton R. R. Co., 4 P. F. Smith, 350.

The Court, PAXSON, J.—This case presents two questions. The first is, whether the engineer of the train was guilty of negligence in blowing the alarm-whistle, the second, whether the plaintiff below was chargeable with contributory negligence in driving a horse admitted by him to be afraid of the cars, upon Gray's Ferry Road, alongside of the railroad, at the time in question.

Negligence has been defined to be the absence of care according to the circumstances. Turnpike Co. v. The Railroad Co., 4 P. F. Smith, 345. In some cases the blowing of the steam-whistle of a locomotive has been held to be negligence; in others the omission to do so has been treated as negligence. Yet there is no want of harmony between these apparently conflicting decisions. The character of the act depends upon the circumstances accompanying it. Thus, it is clearly the duty of an engineer when his train approaches a public highway, if danger is to be apprehended, to give warning by sounding the whistle, or other sufficient alarm. The failure to do so would be negligence *per se*. For while negligence is usually a question of fact for a jury, there are some cases in which a court can determine what omissions constitute negligence. They are those in which the precise measure of duty is determinate—the same under all circumstances. Where the duty is defined, a failure to perform it is, of course, negligence, and may be declared by the court. McCully v. Clark, 4 W. 406. On the other hand, the wanton and unnecessary sounding of the whistle has been held to be negligence. The Penna. Railroad Co. v. Barnett, 9 P. F. Smith, 259, illustrates both of the views suggested. In that case the engineer of the train, having given no notice of its approach, blew his whistle under a bridge whilst a traveller was passing over it, by means whereof his horses took fright, ran off, and injured him. It was held that the omission to give notice, by whistling or other signal, of the approach of the train to the bridge, as well as the blowing of the whistle while the engine was under the bridge, there being no apparent necessity therefor, was properly left to the jury as evidence of negligence.

The plaintiffs in error, having a right under their charter to propel their cars by the use of steam, are not to be held responsible in damages for injuries resulting from the proper use of such an agency. It was held in the Turnpike Co. v. The Railroad Co., before cited, that a loss of property adjacent to a railroad from the sparks of a locomotive, apart from misuse, is *damnnm absque injuria*. It was said by the present chief justice, in delivering the opinion of the court in that case, "the law, in conferring the right to use an element of danger, protects the person using it, except for the abuse of his privilege." It may, therefore, be safely assumed that the company are not liable for injuries resulting from the use of their cars where due care is exercised. The noise of a rapidly moving train, as well as the sound of the whistle, may alarm a horse and cause an accident. Whether such accident imposes a liability upon the company to make compensation in damages, must depend to a great extent upon the fact whether it was the result of a want of proper care on the part of the persons in charge of such train.

What is proper care can not be determined by any fixed rule of law. It must depend upon the facts of the particular case. That which would be due care in running a train through a sparsely settled, rural district, might be negligence, if not actual recklessness, in approaching a large city. The steam-whistle is one of the recognized methods of signalling the approach of a train. Its universal use upon railroads is a strong argument in favor of its efficacy. It is shrill and piercing; can be heard for a great distance, and can be mistaken for nothing else. Yet it has disadvantages. More than all other sounds it is a terror to animals unaccustomed to its warning. Where trains are passing through the built-up portions of towns and cities, it is not needed or often used. In such cases they move slowly, and the ringing of a bell sufficiently answers the purposes of an alarm, and is not so likely to frighten horses. But where it is necessary to warn crossings or bridges at a distance in advance of the train, no sufficient substitute has yet been found for the whistle. It can be heard in any condition of wind and weather. In the abscence of the discovery of any suitable substitute, and in view of its use upon all roads operated by steam, the mere fact of the whistling furnishes no presumption of negligence. Was the whistle used in such a wanton manner as to amount to negligence? The learned judge left this question to the jury, and in so far he was right. But he also left it for the jury to decide whether the use of the whistle at all in that particular place was negligence. The train had passed beyond the closely built-up portion of the city, which ended at 28th street, and there were but few houses between that point and Gray's Ferry Bridge. The engineer whistled about 30th street. The plaintiff says he whistled twice; that the first whistle frightened his horse, and it commenced to run; that just as he was getting it under control there was a second "blast" from the whistle, and his horse then became unmanageable, threw him out, and the wagon passed over him. Gray's Ferry Road and the railroad at this point are side by side. The train and the plaintiff were going in the same dircetion, and at the moment when the accident occurred the train had nearly overhauled him. It was a disputed fact whether the whistle was sounded once or twice in this vicinity. The conductor, engineer, and fireman of the train, and other witnesses for the company, testify that there was but one whistle west of 28th street. Nor is the plaintiff sustained by any of his own witnesses as to the second whistle.

If the court below had left the jury to find negligence from the use of the whistle the second time, if they believed it to have been so used, provided the engineer saw, or with proper care might have seen the plaintiff's wagon, and that his horse was becoming unmanageable, there would have been no error. But he submitted the case to the jury in such a way as left them at liberty to find negligence from the use of the whistle once at or about 30th street.

It must be borne in mind, that the Philadelphia, Wilmington and Baltimore Railroad runs along Washington avenue in this city until it reaches a point opposite to the United States arsenal, situated on the west side of Gray's Ferry Road, between 26th and 27th streets. It there turns, enters upon the company's grounds alongside of the Gray's Ferry Road, and runs parallel with that road a short distance from it, and several feet above its grade to the bridge over the Schuylkill river. The road makes several curves, one at the arsenal, another just east of 28th street, and the third half a square beyond 31st street. These curves are all so decided that the road can be seen for a short distance only beyond them; the Gray's Ferry Bridge and the last two road-crossings being invisible until the last curve has been passed, a point above 32d street. Between 28th street and the Schuylkill there are four road-crossings over the railroad, the bridge being about three squares beyond the last crossing. The bridge is a drawbridge, a watchman being stationed at each end for the purpose of flagging the trains, upon being warned by the whistle of their approach. It was the daily practice to blow the whistle at 30th street. The rules of the company required it. We have seen that there were several crossings, as well as the bridge-tender, to be warned of the approaching train. They were invisible by reason of the curves. The engineer had the right, under the circumstances, to blow the whistle in the vicinity of 30th street sufficiently to give notice of the approach of the train. Its use once, in the ordinary manner, was not evidence of negligence, and it ought not to have been submitted to the jury as such. On the contrary, had he omitted to give such warning, and by reason thereof the plaintiff had been struck and injured by the train, we should have been compelled to say, under the authority of our own cases, that such omission was negligence *per se*.

It was urged that any use of the whistle at this point was unnecessary, and the fact that it has since been abandoned was stated as strong evidence in support of this view. The abandonment, however, was doubtless due in a great measure to the changed circumstances. This locality has been much improved since 1871, and there are many more houses there now than formerly. We have held these corporations to a strict line of responsibility for the failure to give sufficient warning of the approach of their trains at road-crossings. It will not be just to them, nor perhaps safe to the travelling public, for us now to criticize too closely the precise amount of noise employed in giving the needed warning at such places, or the means of producing it.

There was also error in the answer of the learned judge to the defendants' sixth point. It is true the law will not banish horses from the highways. It is equally clear that the plaintiff had a right to drive this particular horse, or any other horse, however vicious, upon the Gray's Ferry Road, at this particular point of danger. We are not dealing with the absolute rights of the parties. The question here is one of prudence and care. Where a man drives an unbroken or vicious horse, or one that is easily frightened by a locomotive, along a public road running side by side with a railroad, and liable to be met or overtaken by a train, he does so at his own risk. It is an act amounting to recklessness. That there was no other road for the plaintiff to use does not matter. There were other horses which he might have procured for use in such a dangerous locality. Duties and obligations are mutual. The railroad company had as high a right to move their trains upon their road as the plaintiff had to drive his horse along Gray's Ferry Road. Both were bound to the exercise of care in accordance with the circumstances of the case.

We do not lose sight of the fact that in such questions as this the interests of other parties are concerned. The right of a man to risk his own life, and that of his horse, may be conceded; but not the right by an act of negligence, if not of recklessness, to place in peril the lives of hundreds of others who may happen to be travelling in a train of cars.

What we have said disposes of the third and sixth assignments of error. The remaining assignments are carved out of the two just mentioned, and do not need more specific notice.

The judgment is reversed, and *venire facias de novo* awarded.

Right of Foreign Corporation to Purchase and hold Lands.

JOHN B. CARROLL v. THE CITY OF EAST ST. LOUIS.*

Supreme Court of Illinois, June Term, 1873.

Hon. SIDNEY BREESE, Chief Justice.
" PINCKNEY H. WALKER,
" A. M. CRAIG,
" JOHN SCHOLFIELD,
" JOHN M. SCOTT,
" BENJAMIN R. SHELDON,
" WILLIAM K. MCALLISTER. } Associate Justices.

1. **Foreign Corporation—Power to Purchase and hold Lands in this State.**—A corporation, created in another state for the sole purpose of buying and selling lands, has no power to purchase and hold the title to lands in this state, as it is against the general policy of our legislation of the subject on domestic corporations, and would tend to create perpetuities.

2. **Contracts enforced by Comity only.**—It is well established that a corporation created in one state can not exercise its functions in another state or sovereignty without permission of the latter, express or implied. The comity between states, so far as at relates to corporations, depends for its exercise upon the laws of the sovereignty in which the power is to be exercised. The comity thus extended is the voluntary act of the state or nation by which it is offered, and is inadmissible when contrary to its policy or predjudicial to its interests.

3. ——. ——. In the absence of any positive law denying or restraining the operation of a foreign law, courts of justice will presume the tacit adoption of them by their own government, unless they are repugnant to its policy or predjudicial to its interests. The public policy of a state must be determined by reference to its general legislation, either by prohibitory or enabling acts, or by its general course of legislation on the given subject.

4. **State Policy—Law-making Power must determine.**—It is the legislative, and not the judicial power of the state, that must control and give shape to its public policy. Courts can only ascertain and observe that policy, and apply it to cases as they arise, without changing or obstructing it.

5. ——. **Case in Judgment.**—A corporation created by the general assembly of the State of Connecticut, for the purpose of purchasing and selling lands to the extent of $500,000, there being nothing in its charter compelling the company to sell lands it might acquire, within any fixed period, expended its whole capital stock in the purchase of land in this state, and made a deed for the conveyance of a lot to the city of East St. Louis: *Held*, in an action of ejectment by the city to recover possession of the lot, that the foreign corporation took no title by its attempt to purchase, and were unable to transmit any to the city.

Appeal from the Circuit Court of St. Clair County; the Hon. Joseph Gillespie, Judge, presiding.

Mr. Charles Conlon and *Messrs. John M. & John Mayo Palmer*, for the appellant; *Mr. Wm. H. Underwood, Mr. C. C. Whittlesey*, and *Messrs. Glover & Shepley*, for the appellee.

MR. JUSTICE WALKER, delivered the opinion of the court.

This was an action of ejectment, brought by appellee, in the circuit court of St. Clair county, against appellant, to recover a number of lots in East St. Louis. A declaration in the usual form was filed, and defendant interposed the general issue. The case was submitted to the court for trial, without a jury, by consent of the parties, and the issue was found for plaintiff, and a judgment was rendered in its favor.

The parties stipulated on the trial in the circuit court, that in September, 1869, the fee of the premises in dispute was in Samuel S. M. Barlow and others, and that they conveyed the land in dispute to the "Connecticut Land Company;" that it was a body corporate, created by the general assembly of the state of Connecticut, by act of the 27th of July, 1860. Their charter shows that Joseph Aslop, Wm. M. McFarland, Samuel S. M. Barlow and Wm. H. Aspinwall, were created a corporation, with a capital stock of $200,000, with the privilege to increase it to half a million.

*From advance sheets of 67 Illinois Reports, received through the courtesy of Hon. Norman L. Freeman, Reporter.

They are empowered by their charter to adopt by-laws, provided they do not conflict with their charter, or the laws of Connecticut. The body is empowered to receive, grant, convey, dispose of and transfer real estate, and to take the management and charge of the same, as well as such personal property as they may deem necessary to carry on their business transactions, and sell and exchange the same for other property as they may deem to the interest of the corporation. They are also authorized to make, execute and deliver all necessary instruments, either with or without the seal of the corporation.

The charter provides that the affairs of the company shall be managed by not less than seven directors, one of whom shall be president. The office of the company is, by the charter, located at Hartford, in that state.

It appears from the stipulation, that the company purchased the property of Barlow and others, and took possession and held it until they conveyed to the city. It is also agreed that after the sale was made to the city, defendant entered into possession of the lots and still holds them; that the company holds these and other lands in and near the city of East St. Louis, in the purchase of which their capital of $500,000 has been expended. And it was finally stipulated that the points to be decided were: "Had the Connecticut Land Company power under their charter to hold the lands in fee simple, under the deed from Barlow aud others? Had the company power to convey the title in fee to the city?

Can a corporation created in another state, for the sole purpose of buying and selling lands, come here and prosecute the business for which it was created, by purchasing and holding lands in this state?

Owing to the interests involved in the case under consideration, and the results which may flow from the answer which may be given to this question, it is supposed to assume more than ordinary importance. Whether there are other sales similar to this, the record fails to disclose; and if there be any others, whether many or few, that fact could not change the law nor the decision of the case, and hence we shall disregard that portion of the argument which insists that other conveyances are endangered. We shall endeavor to decide the case on the record, as made and presented to the court.

All persons in the profession, we presume, will admit that a corporation, created in one state, can not exercise its functions in another state or a different sovereignty without permission. This is the doctrine announced in The Bank of Augusta v. Earle, 13 Peters, 589: O. & M. R. R. v. Wheeler, 1 Black. 297; Ducat v. City of Chicago, 48 Ills. 172, and Paul v. Virginia, 8 Wallace, 168; and if the proposition were not so fully understood and so firmly established, numerous other cases might be cited as confirming the rule.

The all-important question, then, in this case, is to determine whether consent can be inferred from the course of legislation as indicating the general policy of this state. If such consent exists, it can be gathered alone from implication, as there is no direct legislation on the subject. In the case of The Bank of Augusta v. Earle, *supra*, it was said that the comity between states, so far as it relates to corporations, depends for its exercise upon the laws of the sovereignty in which the power is to be exercised, and a corporation can make no valid contract without their sanction, expressed or implied. The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy or prejudicial to its interests. It is also said in the same case, that in the absence of any positive law affirming, denying or restraining the operation of a foreign law, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interests. It must be conceded that each state has the power, uncontrolled by another, to establish rules regulating the tenure of the lands lying within its limits, and the manner of buying and selling property by persons under its jurisdiction.

If, then, as there is no direct legislation on the subject, this purchase by the Connecticut Land Company is repugnant to the policy of the state, or it is prejudicial to its interests, the sale we have seen would be void. In this investigation it must be remembered that the law-making power of the state where the authority is proposed to be exercised, is alone invested with the authority, and must determine its public policy. With this power the courts have not been entrusted. It is for them to ascertain and apply the law and the legislative policy, and not to inaugurate it. The public policy of the state may be ascertained by reference to the general course of legislation, either by prohibitory or enabling acts, or by its general course of legislation on a given subject.

Our general assembly have, in a variety of modes, and on a very large number of occasions, manifested in unmistakable terms, a determination that perpetuities in real estate shall not exist in this state. To prevent it and keep the tenure of the lands free, at an early period in the legislation of the state, the common law allowing entails was abolished, and such conveyances rendered inoperative to create such an estate. And inasmuch as such tenures create a perpetuity in particular families, it tends to give to them special privileges not enjoyed by all. It is the foundation upon which aristocracies are built and sustained. It takes real estate out of market and prevents its acquisition by the citizens generally, and prevents its distribution even in families by devise or descent. These, and it may be other considerations, have induced, it is believed, every state in the Union to abolish estates tail, because they, by creating perpetuities, are not in harmony with the principles upon which our government is based, and are prejudicial to the general welfare and prosperity of our people.

The policy of the legislation in this country, ever since the establishment of our form of government, has been with a view to leave all free to acquire property, and to protect and foster no class by conferring special privileges, or placing, or even permitting wealth to be placed in the hands of a portion, to be held in perpetuity. In fact, its pernicious effects were so clearly seen and felt in Great Britain, that perpetuities have been discountenanced in their jurisprudence. The theory of our government is, that not only the laws must protect all alike, but that every citizen must be left equally free in the pursuit and acquisition of property. When feudalism prevailed throughout Europe, the care of the governments was for the lords and the privileged classes, and entails and perpetuities of tenures in their families, or particular portions of them, were adopted as the best means to secure their continued wealth and influence. But as trade and commerce advanced, and the principles of free government became better understood, it was found that the public welfare was retarded by restrictions upon the tenures to their landed property, and for centuries the fetters that have trammeled it have been gradually and constantly relaxing and being removed, until many of the inconveniences attending the system have disappeared.

Of the same nature as the feudal system were monasteries and religious houses, that acquired large bodies of lands and held them in perpetuity. The prejudicial effects of this policy were at an early day felt, as it took real estate out of the commerce of the country, and was found to be a serious impediment to national prosperity if not to advancing civilization. This was, perhaps, the strongest motive that led to the enactment of the laws of mortmain in Great Britain. There were no doubt other considerations, such as, that it curtailed the power and influence of the feudal lords, and their loss of revenues by being deprived of their escheats, wardships, reliefs and the like. Hence, these laws of mortmain were adopted, allowing the lord immediate to declare a forfeiture of the estate sold to a corporation, and on his failure to do so, then the lord mediate might, and on his failfure to do so, then the king.

Thus it will be observed that these statutes do not prevent corporations from taking title by conveyances, but only enabled the forfeiture of the title, which thus passed to the lord or the king. If, then, these bodies are not prohibited from taking by the laws of mortmain, they, if in force in this state, would not prevent this corporation from holding lands until the state should proceed and obtain a forfeiture. Whether or not they are in force when applied to a proper case, we shall not now determine, as we think they have no application to this case.

Our general assembly have, from the very organization of our government, manifested a clear and decided opposition to permitting corporate bodies to hold lands to any great extent in perpetuity. In granting charters to insurance, agricultural, manufacturing and benevolent organizations, of which we have large numbers, as a general rule, with, it may be, a few exceptions, when authorized to buy and sell lands, they have been restricted to a small quantity. So jealous has been the legislature of the power to purchase and sell lands by these organizations, that it adopted, as a policy, that the authority thus given should not be perverted and abused; that they, as an undoubted policy, limited the power to only enough of real estate to enable them to carry out and accomplish the purposes of their organization, other than buying and selling real estate.

In the advancement of education, the most cherished object of our people and their representatives, we would expect, if anywhere, to find the greatest and most liberal relaxation of this policy. If permitted to own and lease large farms, colleges, academies and seminaries could thus greatly increase their revenues and avoid the financial embarrassments that so generally overtake and destroy these popular institutions. But even the great object of education has not induced our general assembly to depart from its policy of preventing these bodies from holding lands in perpetuity. In the great number which have been incorporated by special charter, we have examined many, but have found none but are limited to comparatively a small quantity of land. The general assembly seem to have been determined, no matter how useful the ownership of land in perpetuity might be in supporting these institutions, or how much it might aid in accomplishing the object of their creation, they should not have that means. And where, in such charters, power has been given to receive donations of lands, they have, almost invariably, been required to sell it in three, five, seven or ten years, at most, thus unmistakably showing a settled policy that no means should be possessed by corporations, whether as the primary or auxiliary purpose of their creation, to hold lands in perpetuity. So with churches; all know that the burthens of supporting religion could be greatly diminished if they could hold large bodies of lands and houses, and derive large revenues from rents and profits. But it is believed that our legislature has not, unless it be with rare exceptions, departed from its fixed policy, even with these bodies, where incorporated.

In fact, the whole course of our legislature, in the hundreds of charters granted, shows a fixed and stern determination not to yield such powers to these bodies. At the session of 1843, the general assembly passed a general law authorizing the organization of incorporated seminaries and academies of learning. Whilst this law granted large powers to such bodies, it expressly inhibits them from severally holding more than 160 acres of land. This law was revised in 1849, when the power to hold lands was increased to 1,000 acres. In 1835 (p. 188), a general law was adopted; authorizing the incorporation of religious societies, and by it these bodies are limited to ten acres. And the act of 1839 authorized any church to hold forty acres for camp-meeting grounds. The general law, found in the Revised Statutes, p. 121, for the incorporation of libaries, limits their property, real and personal, to the annual value of $600, exclusive of their library and the annual payments made by the members.

In 1849, a general law was adopted, authorizing boards of trade to be incorporated, and limited their power to hold real estate to one city, town or village lot, and building, in the city, town or village where the body is located.

In 1852 a general law was passed authorizing the incorporation of hospitals for boatmen, and it limits the amount of land such an organization can hold to ten acres.

At the session of 1855, a law was adopted authorizing the incorporation of agricultural societies, and they are prohibited from holding more than $10,000 worth of property, of every kind or description. At the same session, a law was adopted authorizing the formation of incorporated cemetery associations, and they are limited to fifty acres.

At the session of 1859, a law was passed authorizing the formation of benevolent societies as incorporated bodies, and by implication limits the power to hold real estate to the lot and house used by the company, and to donations, which, by the eighth section, are required to be sold within five years.

At the session of 1849, a law was adopted, enabling the formation of corporations for manufacturing, agricultural, mining and mechanical purposes, and it limits the amount of real estate which they may hold to what is necessary to carry out the general purposes of their organization.

Another law was adopted in 1859, for the organization of incorporations for benevolent, educational, library, musical, scientific and missionary purposes. The eighth section prohibits, by implication, the holding of real estate to the lot and building thereon used by the company, and requires donations of lands to be sold in five years.

In the act of 1857 (p. 161), the incorporation authorized for manufacturing, mining, mechanical and chemical purposes, is authorized to hold only so much real estate as may be necessary to carry out the purposes of their organization. Other general laws might be referred to, as well, it is believed, as hundreds of special acts which contain similar restrictions.

We are fully aware that the object of the creation of such bodies was not to buy and sell lands, but the legislature seem to have been vigilant in expressly preventing such bodies from using the power contained in most of their charters to purchase and convey such property, from being perverted to such a use. It is this extreme caution that manifests the policy of the law-making power of the state. We do not infer this policy, as seems to be supposed, because the legislature did not, in terms, confer the power on these various bodies, but it is from the almost uniform prohibition of its exercise, and in this is the distinction.

We have been referred to some half a dozen private acts passed by our general assembly, creating corporations for various purposes, in which power is, identically in some, and as the primary object in others, given to buy and sell lands. They are special and private laws, and to our mind do not tend, in the slightest degree, to determine the general policy of the state on the subject. Like all other exceptions, they tend to establish, rather than impair, the force of the general rule. It is to the general laws of a state to which all persons refer to ascertain its general policy; but in this case our special legislation is overwhelmingly in support of the general laws on the subject. We are totally at a loss to conceive how we can infer that, because a few special charters are opposed to the fixed and almost uniform policy of the state, for a half of a century manifested on almost every occasion when a charter was asked, that the entire policy of the government has thus been changed. We regard it as forming none, not even the slightest ground, for such an inference. But since the charters referred to were adopted, as also that under consideration, the same policy has been clearly manifested.

At the session of 1871-2, the general assembly, in revising the general incorporation laws, have adhered strictly to the policy so clearly manifested by former legislation. The first section of that

law provides for the formation of such bodies for any lawful purpose, except banking, insurance, real estate, brokerage, the operation of railroads and the business of loaning money. It is contended that this section, by implication, authorizes the formation of incorporations to buy and sell real estate, as it does not, in terms, prohibit it, and if so, the Connecticut Land Company may do so, as we should infer a change of policy. If this was the only provision in this enactment, it would be a violent presumption, in view of the past legislation, to arrive at such a conclusion. But the fifth section relieves it from all doubt, if there is any, as it limits all but churches, organized under the act, to so much real estate as may be necessary for the purposes of their organization. Churches are, as before, limited to ten acres; but corporations are authorized to purchase lands in satisfaction of debts due them, but are required to offer the same for sale at public auction, as often, at least, as once in each year, and if not thus sold for cost and interest within five years, the state's attorney is required to institute proceedings in the circuit court for the sale of such property.

We should not expect that foreign corporations, who can perform no binding act in our state without our consent, would demand more rights and privileges than are conferred on our own, created by general law. If the general assembly, for any reason, confers special powers upon a few corporations that have been persistently and almost uniformly denied to all other corporations of our state, it gives foreign bodies, who only act here by mere sufferance, no right to demand the same privileges. They should surely not complain if permitted to exercise their powers here to the extent, and only to the same extent, that similar bodies of our own are allowed under our general laws.

Again we learn from the journals of the two houses of the general assembly, that a charter similar to this, and apparently for the same purpose, and to subserve the same interest, was asked at the session of 1867, but it failed to pass because of an adverse vote. The application was renewed at the session of 1869. The bill passed both branches of the general assembly, and was sent to the governor for his approval, but he returned it with his objections, to the senate, where it originated. In his message, the Governor placed his objections on the ground of public policy; and that, even if that bill were harmless, still it would form a dangerous and unwise precedent. In these views, the senate seem to have almost unanimously concurred, although the charter limited its existence to twenty-five years, as but three members voted for its passage, notwithstanding the governor's objections, and all of the other members against its adoption.

In the light of all the legislation, it would require a great stretch for the courts to disregard the policy of the state which has obtained from the first. It is the legislative, and not the judicial power of the state, that must control and give shape to its public policy. That power does not pertain to the courts. They can only observe that policy and apply to cases as they arise, without changing or obstructing it.

The charter of this company, by obscure language, gives power to purchase lands, and authorizes the body to sell and convey the same. There is nothing in it requiring them to sell a foot of such lands for centuries to come, and if efforts were made to compel them to sell, then the claim of vested rights would, no doubt, be interposed. Again, that body is beyond the reach of our laws to dissolve it if they abuse their franchises and forfeit their charter. Hence it would be, no doubt, highly prejudicial to our people to have lands held in their midst in perpetuity, and beyond the reach of our law, let them abuse their powers as much as they might choose. Nor are we prepared to hold that a sister state may send here, purchase large bodies of our lands, and lease and control them and their title under the laws of that state. And if the state can not, it can not create an artificial body to come here and hold them under such regulations as their charters or amended charters may prescribe.

We have been referred to numerous and able opinions of courts of other states, for whom we have the highest respect, which announce a different rule from that we have adopted. In those opinions, we have no doubt they have fully and fairly carried out the legislative policy of their states. But we have as little doubt that their public policy differs from ours. What may be supposed to be highly calculated to advance the public interests of one state, may be regarded as pernicious in another; hence the great diversity in the statutes of the various states, which are but a manifestation of the public policy of each state. And, in the light of the past and present legislation in this state, we do not entertain the slightest doubt that we have, in this case, adhered strictly to the fixed policy of our state, and if so, we are powerless to change that policy if we would. If, in our conclusions, we are mistaken, the legislature can, and no doubt will, promptly apply the corrective.

We will say that, since the petition for a rehearing was filed, we have gone over and carefully reviewed the entire grounds of our decision, and have found nothing to even create a doubt as to its correctness, but have availed ourselves of the opportunity of putting our views in somewhat a different form, which will be substituted for the opinion previously filed.

We are, therefore, compelled, in view of the conclusion at which we have arrived, to hold, that it is manifestly against public policy, and would be prejudical to our state, to permit the Connecticut Land Company to come here here and purchase and hold lands, and sell, or hold them in perpetuity, as they might choose; and we, under the authority of The Bank of Augusta v. Earle, *supra*, must hold that, by the effort to purchase, this company took no title to these lands, and were unable to transmit any to the city. Hence, there was no right to recover, and the judgment must be reversed.

We do not desire that what we have said shall be applied to incorporations, whether domestic or foreign, which have purchased lands for the mere purpose of erecting offices or buildings necessary for the purpose of carrying out the legitimate business for which they were organized, and in purchasing lands in collecting debts. In such cases, where their charters have authorized it, we presume they might purchase and hold real estate to that, but no greater extent.

The judgment of the court below is reversed, and the cause remanded.

Mr. Justice SCOTT, and Mr. Justice SHELDON: In so far as the above opinion would hold invalid a transfer of land by the corporation to a purchaser, we are not prepared to concur therein.

Correspondence.

THE TEXAS CONSTITUTIONAL CONVENTION—DID THE VOTE ON THE CALL REQUIRE A MAJORITY OF ALL THE ELECTORS OF THE STATE, OR ONLY A MAJORITY OF THOSE VOTING?

EDITORS CENTRAL LAW JOURNAL:—The Galveston News, in a recent issue, in commenting on the reports then received from eighty or ninety places, on the constitutional convention question, uses the following language:

It is within the bounds of safety to estimate the aggregate vote, covered by reports thus far received, at about 25,000, and the majority for a convention about 3,000. It does not seem probable that future returns will double the aggregate or the majority. But let us suppose that the one is 50,000, and the other 6,000. As the registered vote of the state is estimated at about 160,000, it appears on the foregoing supposition, that less than one-third of the total number of voters in the state turned out at the election, and that about one-sixth of that total number voted for a convention. Nevertheless, the governor is expected to construe the vote of this small minority into the express desire and demand of the majority of the people to have a convention. He might well feel embarrassed by such an emergency. And the delegates, when called into assembly, might well feel diffident as to their representative capacity with respect to the great body of the people. * * * Under accepted parliamentary maxims, such a vote as indicated could never carry a measure. A quorum of voters ought not to be less than a majority. But

here we have a measure presumed to be carried by a little more than one-half of less than one-third of the voting population of the state.

This objection, from so able and influential a journal, conveys a dangerous suggestion in opposition to the expression of the popular will. And with all due respect, it is suggested, both upon reason and authority, the argument is easily refuted. The election was held under the law passed by the last legislature, which provides,

* * * Section 3. Such delegates shall be chosen and elected by the qualified electors of the state of Texas, as folows:

The qualified electors of each senatorial district shall choose and elect three delegates.

Section 4. An election shall be held on the first Monday in August, 1875, for the election of such delegates; such election shall be governed and controlled by the laws now in force in regard to general elections; and at said elections each voter, in voting for delegates, shall vote "For Convention," or "Against Convention," and the vote of each county for and against convention shall be certified to the secretary of state by the presiding justice of such county; and if, upon the count of the vote of the people of the state, it be found that a majority have voted for a convention, it shall be the duty of the governor to issue his proclamation convening the delegates elected, etc. * * * Provided, that if it be found that a majority of the voters at said election have voted "Against Convention," then said convention shall not be convened. Acts of 1875.

It is an ancient and well settled rule, that in construing any part of a law, the whole must be made, if possible, to harmonize all the parts with each other, and with the general scope; while the different parts reflect light on each other. Sedgwick on Statutory and Constitutional Law, 199–200–1. Can it be contended, under a proper construction of this law, that a majority of the voters at said election voting "Against Convention" would defeat it; and that a majority of the very same voters, voting "For Convention," would not carry the question affirmatively? Is not the question plainly settled under the very law under which the election is held?

The single point raised by the News, is the smallness of the vote, in the aggregate, and the meagerness of the vote "For Convention," as compared with the number of registered voters of the state. It intimates no charge, whatever, against the validity or fairness of the election, in any other respect. So much the more dangerous is the tendency of its objection.

If the argument of the News is sound, it at once saps the foundation of American government, national state and municipal. A President and Congress might attempt to retain office, after the expiration of their lawful terms, because of the meagerness of the vote for their successors. So with a governor and legislature. So with a mayor and city council. So with the judges of the courts.

To negative the position of the News strongly, we will suppose that all of the 160,000 voters of the state had participated in the election, 10,000 voting "Against Convention," and 15,000 voting "For Convention," and 135,000 putting in blanks. A rather clear indication that 145,000 out of the 160,000 voters of the state were opposed, or utterly indifferent to a Convention. Yet, as a sound legal proposition, the question would be thereby decided in the affirmative, and the governor should convene the delegates.

The elector is under no legal obligation to vote either way, or at all. In most of the states a plurality of the votes cast determines an election. In others, as to some elections, a majority; but in determining upon a majority or plurality, the blank votes, if any, are not to be counted; and a candidate may therefore be chosen without receiving a plurality or majority of voices of those who actually participated in the election. Cooley's Con. Lim. 614. It is to be presumed that all the electors knew the law submitting the question to the popular vote, and were not prevented from voting, by fraud or misconduct on the part of those managing the election. People v. Brenham, 3 Cal. 477. It is also presumed all those who did not see fit to vote, acquiesced in the action of those who did vote, and accordingly are equally bound and concluded by the election. State v. Binder, 38 Mo. 450. Where the act required "a majority of the voters of the county" to be in favor of the tax, to be valid, the test is, the number of votes actually cast; no other evidence of the number of voters will be allowed, *unless the act expressly allows it.* Louisville & Nashville R. R. Co. v. Davidson Co., 1 Sneed, 637. Elections are to be determined by the majority of the ballots cast, and are not to be set aside on account of the meagerness of the vote, without distinct and circumstantial allegations of error, fraud, violence, or illegality, *affecting the result.* Augustin v. Eggleston, 12 La. An. 366. Where a city government is required to obtain a vote of two-thirds of the qualified voters of a city in order to create a debt, it is sufficient to obtain a vote of two thirds of those actually voting. State v. Mayor of St. Louis, 37 Mo. 270. Unless the law under which the election is held, expressly requires more, a plurality of votes cast is sufficient to elect, notwithstanding these may constitute but a small portion of those who are entitled to vote, and the voters generally may have failed to take notice of the law requiring the election. Cooley's Con. Lim. 620. *Even if the majority expressly dissent, yet if they do not vote, the election by the minority will be valid.* Oldknow v. Wainright, 1 W. Bl. 229; Rex v. Foxcroft, 2 Burr. 1017; cited with approval in First Parish in Sadbury v. Stearns, 21 Pick. 148. In Rex. v. Withers (referred to in Rex. v. Foxcroft), there were eleven electors, six protested against proceeding and did not vote; the candidate receiving the other five votes was declared to be duly elected, and the court held that the six virtually consented to his election.

The question, in the construction of both statutory and constitutional provisions, would hardly now seem to admit of discussion, so strongly is it affirmed by the great current of judicial decisions, and the customs of the country. And many of the constitutions of those states, which contain provisions of this character, were framed under the light, and have attached to them the significance, of these decisions and customs. The present constitution of Texas, Art. 12, § 50, in providing for amendments by legislative enactment, thereafter to be submitted to a vote of the people, says, "and if, thereupon, it shall appear that a *majority of those voting* upon proposed amendments, have voted in favor of such amendments," a ratification by the succeeding legislature makes them a part of the constitution; showing that the convention which framed the constitution, construed the general requirements "of a majority of the electors of a state," to mean a majority of those voting, and not a majority of all the electors — and this in a provision for amending the constitution itself. It may be said, this is an express constitutional provision, of course to be controlling in the particular instance, but having no force as a general rule, or as a construction of a general principle. Twenty-five other states have almost precisely similar provisions in their constitutions. Now, judicial construction upon like constitutional provisions, had established the same principle before the adoption of many of these constitutions. Where, under some of the constitutions, certain votes can only be carried by a *majority of electors* voting favorably, this must be understood to mean, a majority of those voting at the election on any question. Taylor v. Taylor, 10 Minn. 107. And the courts have held it to be a safe rule of construction, that if, when framing the organic law of a state, the convention thought proper to borrow provisions from the constitutions of other states, which provisions have already received a judicial construction, they adopted the provision in view of such construction, and acquiesced in its correctness. People v. Coleman, 4 Cal. 46; Attorney-General v. Buerst, 3 Wis. 387; De Cordova v. City of Galveston, 4 Tex. 419. The framers of the constitution undoubtedly used terms and expressions with the meaning that was familiar and sanctioned by long usage. State v. Delesdenier, 7 Tex. 96.

In all such questions, the point of enquiry is, the will of the electors, as manifested by their ballots. Cooley's Con. Lim. 624. And the tests upon this are plain, and not easily to be misunder-

Dickey v. Hurlburt, 5 Cal. 343. Held in a manner conformable to the law, by the proper officers. This determines its validity. McKinney v. O'Conner, 26 Tex. 12; Satterlee v. San Francisco, 23 Cal. 314. And to establish title to an elective office, that claimant received a majority, or plurality, *of all the lawful votes cast*. Fish v. Collins, 21 La. An. 287. The ballot a better evidence than the tally list. People v. Holden, 28 Cal. 123.

The objection of the News seems to assume that every voter who failed to vote was opposed to a convention, and would have voted against one, had he voted at all. This reasoning is not fair to the twenty-five or fifty thousand who did vote. We think it a much fairer argument and conclusion, that among those who did not vote, the same proportion exists of those for and against a convention, as among those who did vote. Upon what possible hypothesis can those who failed to vote be made to count against a convention? Is not the principle running all through the decisions, and supported by reason and common sense, that those whose indifference causes them to fail to vote, shall not be counted *either way*, as against those who participate in the election and vote for or against a question? How can an expression of the popular will be obtained in any other way? A different rule would make the elective franchise a mere mockery.

The election was controlled by the laws in force in regard to general elections. Under the general laws, "The secretary of state, in the presence of the governor and attorney general, shall open and count the returns. And the governor shall immediately make out and sign, and deliver a certificate of election, with the seal of the state thereto affixed, to the person or persons *who shall have received the highest number of votes* for each or any of said offices." Paschal's Digest Laws, Art 6808. Under the law submitting the convention question to the people, "And if, upon the counting of the vote of the people of the state, it be found that a majority have voted for a convention, it shall be the duty of the governor to issue his proclamation convening the delegates," etc. The governor, secretary of state, and attorney-general, are here, by law, constituted a board, to *canvass the votes and declare the result*. They are to receive the returns transmitted to them, if in due form, as correct, and to ascertain and declare the result, as shown by such returns. They are not vested with judicial or discretionary power in the matter, but their action is *ministerial*. To reject returns transmitted to them, on other grounds than those appearing on their face, or to fail to act upon those returns as the law directs, would be a usurpation. See Cooley's Con. Lim. 621–2, and authorities there cited.

It is respectfully suggested, no analogy exists between the rules governing a popular election, and those governing parliamentary or legislative votes. The vote of the citizen, at a popular election, is an exercise of sovereignty. There is no power compelling him to vote at all, or in anywise controlling the direction of his ballot. A member of the legislature exercises a delegated power, conferred upon him by the citizen at a popular election. If within the house when a question is put, he is compelled to vote, unless the house, for special reasons, shall excuse him. Jeff. Man. 143. He is compelled to vote for or against a measure, and to vote *viva voce*. His every word and act is governed by established parliamentary rules, and his powers are limited by the constitution of his state.

We apprehend Governor Coke, as he signs the proclamation convening the delegates, will feel no more embarrassment than he would in signing an ordinary act of the legislature, passed under all the requirements of the constitution.

PHILIP LINDSLEY.

DALLAS, TEXAS, Aug. 13, 1875.

Book Notices.

THE WIDE AWAKE: An Illustrated Magazine for Girls and Boys. Edited by Miss ELLA FARMAN, of Bedford, Calhoun Co., Mich. Published by D. Lathrop & Co., 38 and 40 Cornhill, Boston, Mass. Monthly. $2.00 per annum.

It is perhaps "travelling out of the record" to notice a publication of this character in a law journal; but we may be permitted briefly to say that it is the most entertaining, best printed and best illustrated juvenile publication with which we are acquainted. It will be a perfect delight to little folks.

MACARTHUR'S REPORTS, VOL. 1.—Reports of Cases Argued and Determined in the Supreme Court of the District of Columbia (General Term), at the April and September Terms, 1873, and at the January, April and September Terms, 1874. By ARTHUR MACARTHUR, Associate Justice. Washington: Government Printing Office. 1875.

From the preface to this volume we learn that the Supreme Court of the District of Columbia was organized by the act of Congre s of March 3, 1863, and is the only court of original and superior jurisdiction at the seat of the general government. In addition to the powers and jurisdiction of a circuit and district court of the United States, it has general jurisdiction in law and equity. It can also proceed in all chancery causes instituted before it, in which either of the parties resides without the district, as was done in the Supreme Court of Chancery, in the state of Maryland, on the 3d day of May, 1802. It has also power, at the general term, to hear and determine all appeals from the decisions of the Commissioner of Patents, where the party appealing is dissatisfied with the action of the commissioner. It exercises the power and duties of the late Orphans' Court, and administers the estates of deceased persons; and it holds terms for the trial of all crimes and offences arising within the District. The proceedings in the police court and before justices of the peace, may also be removed into it by appeal, for final determination; and it is the only local tribunal in the district, having original power to issue the writ of mandamus to heads of departments and other inferior officers in regard to the performance of ministerial duties. The law, equity and criminal business of which the court has cognizance, is transacted at special terms held by a single justice; and any party aggrieved by the order, judgment or decree pronounced at such terms may appeal to the general terms, held by all the justices, or at least three of them, sitting in banc. This, however, is not a final court, but its judgments and decrees are re-examinable in the Supreme Court of the United States upon writ of error or appeal, in like manner as was previously provided in reference to the Circuit Court of the United States for the District of Columbia. (12 Statutes at Large 764). The justices of this court do not hold their offices, like those of some of the territorial courts, by the precarious and degrading tenure which makes them subject to removal at the whim of the President, but, like the judges of the federal courts generally, "during good behavior." Suspicions might, however, arise, that a court, sitting at the seat of the general government, some of whose judges have stepped into their judicial positions from political life, and all of whom have been appointed from the ranks of one political party, might be infected with political influences; and certain opposition journals have more than once charged or insinuated that this is the case. We do not know that the court has hitherto done anything to justify such an imputation.

The common law (by which term we mean to include equity) exists in the District of Columbia with very little statutory adulteration. In running through volumes of English or American state reports, the mind is struck by the great preponderance of decisions which merely involve the construction of statutes. Our readers may therefore be surprised when we tell them that nearly all the cases in this volume, rest on general principles of law and equity, independently of statutory enactments. Other things being equal, then, these reports ought to acquire an exceptional reputation, as a series of pure law and equity reports.

In this volume Mr. Justice MacArthur exhibits a high order of skill as a reporter. The facts of each case are clearly, but succinctly stated. The briefs of counsel are given, but suitably condensed. His head-notes are so clear that the mind has no difficulty in comprehending at once the points ruled in each case. The volume comprises 106 cases; in 79 of which the opinions are written; in 16, they are "per curiam" or "by the court;" in 9, the "substance" only of what the court held is given; and 2 are oral opinions. It is printed in fair style, but contains paper of two or three shades of color.

Lobbying Contracts—Public Policy.—The first case is that of Child v. Trist, reversed by the Supreme Court of the United States, in which the latter court held that a contract for payment of services as a lobbyist, in getting a private bill through Congress, is against public policy and void. The report here does not purport to give an opinion of the court, either writen or oral, but merely what "the court in substance held." Mr. Justice Wylie dissented, and was sustained by the court above. Only one other case in this volume has so far been reversed—that of Stephens v. Beal, p. 38.

Lease Executed by Agent with Individual Covenants.—In Slott v. Rutherford, p. 7, the court passed upon a lease of real estate, in which the lessors are described as "acting as a church extension committee, by authority and on behalf of the general assembly of the Presbyterian Church, old

school," parties of the first part, who executed the lease in their individual names and seals, and which contained reciprocal covenants to be performed by the parties respectively, one of which was payment of rent to the lessors, their successors or assigns, and another was "to surrender and deliver up the premises to the said parties of the first part, their successors or assigns." These words would seem to indicate beyond any room for doubt, that the instrument purported to have been made by agents in their representative capacity. But the court held that it was a nullity, (1) as to the owner, because it was not his contract; (2) as to the lessors (the agents) because they have no estate in the property; and (3) as to the lessee, because it is not binding on the other party. From this conclusion Mr. Justice MacArthur and Mr. Justice Humphreys dissented.

Foreign Judgment—Conclusiveness of Judgment against Foreign Corporations.—Weymouth v. Washington, etc., R. R. Co., p. 19. A railroad company created by the legislature of Virginia, and also allowed by an act of Congress, to run its road into the District of Columbia, borrowed a sum of money in the city of New York, through the agency of its treasurer, and no part of it having been repaid, suit was commenced in the Supreme Court of New York by service of process on its secretary, who was found there, and judgment was rendered for the full amount. Upon a transcript of this judgment, an action was brought in the Supreme Court of the District of Columbia. *Held*, that the judgment of the New York court was valid and conclusive upon this court.

Letter of Credit—Guaranty.—Henderson v. Reilly, p. 25. A letter of credit, drawn in favor of M., was addressed to a mercantile firm in Baltimore, stating that the parties who had signed it were willing to become sureties for M. in the sum of $1,200, for the faithful performance of his duties as agent of said firm. *Held*, that such letter was an offer for a future credit or act, and that notice was necessary to be given to the guarantors by the person giving the credit, within a reasonable time, that he had accepted the offer and intended to act upon the faith of it; and also that if such person sold goods or gave credit to M., on the faith of such guaranty, without giving notice, the guarantors were not liable.

Ejectment—Outstanding Mortgage.—Kirk v. Parkhill, p. 28. Where a defendant in ejectment sets up an outstanding mortgage belonging to a stranger to the record, in which he does not claim to be interested, it must be a present and subsisting mortgage; otherwise it will be presumed to have become extinguished. In such a case, where the mortgage was executed and recorded more than forty years before the commencement of the action of ejectment, it will be presum d satisfied, and the court can so rule without the aid of a jury.

Divorce—Husband's Equity in Wife's Property.—Jackson v. Jackson, p. 34. This is a case of interest to those who keep their property "in their wife's name," in order to defeat their creditors, and who do business *as the agent of their wife*. Such a person was sued by his wife for divorce, she not asking alimony. He filed a cross-bill charging adultery upon the wife, and alleging that certain property which was held in the name of the wife alone, had been acquired since their marriage, by their joint earnings. Divorce was granted on her petition; but it was held that an equity in this property by way of trust, might be deduced for the benefit of the husband, and that under the 9th section of the act regulating divorces, the court had power to set off to the wife such part of the property as might be reasonable, in view of the resources and circumstances of the husband. It is difficult to see how *power to grant the husband a portion of the wife's property*, can be deduced from the statute in question, which reads as follows, the italics and words in brackets being ours: "In all cases where a divorce is granted, the court allowing the same shall have power, if it see fit, to award alimony *to the wife*, [not to the husband] to retain *her right of dower*, [not his equity] and to award *to the wife*, [not to the husband] such property or the value thereof as she had when she was married, or such part or the value thereof as the court may deem reasonable, having regard to the circumstances of the husband at the time of the divorce." Nor can we understand upon what grounds of equity the decree of the court can rest. If the property, so far as the husband had an interest in it, was a *bona fide* gift from the husband to the wife, it was hers and not his; and to take any portion of it from her and give it to him, was simply to take one person's property from her and give it to another without compensation. If it was a fraudulent conveyance made to the wife, to defeat, hinder or delay creditors, then the husband is estopped from setting up his own fraud, or from claiming a benefit under it. Bump on Fraudulent Conveyances, § 271, 458; Story Eq. Jur., § 371.

Life Insurance—Declaration by the Person Insured.— In Day v. Mutual Benefit Life Insurance Co., p. 41, Mr. Justice MacArthur, in an elaborate opinion, lays down the rule afterwards declared by the Supreme Court of the United States, in Jeffreys v. Economical Mut. Life Ins. Co. (2 CENT. L. J. 344), a rule which seems to be strictly consonant with good sense and justice. The following is the syllabus: A policy of life insurance contained a stipulation that it should be void if a certain declaration made by, or for the person whose life was insured, "and upon the faith of which this agreement was made, shall be found in any respect untrue." The declaration referred to was made for the purpose of securing the policy, and contained answers to certain enquiries respecting the health of such person, and as to his having had certain diseases therein enumerated. *Held* (1), that such declaration constituted a portion of the contract, and the statements therein were made material by the contract, and the only question of fact respecting them that can be determined by the jury, is whether such statements are true or false, and not whether they are material; and (2) that it was a misdirection to instruct the jury that, in order to avoid the policy, it was necessary to show that the assured himself knew that he was misrepresenting in making such statements; the question upon this subject being whether the statements were untrue in point of fact, not whether the assured knew them to be false.

Property in Dogs—Power of Municipal Corporation to compel Dog-Owner to take out License.—Mayor and Aldermen, Etc., of Washington v. Meigs, p. 53. Return J. Meigs, Esq., clerk of this court, author of that admirable work, Meigs' Tennessee Digest, and one of the revisers of the Code of Tennessee, a venerable lawyer, whose mind is a vast storehouse of common law knowledge, derived from such good old books as Blackstone, Bacon's and Viner's Abridgements, Comyns, Tidd and Chitty—"had a dog which was not all a dog, for in his nature there was something human." So at least we might be privileged to suppose; for he refused to submit to an ordinance of the city of Washington, which required him to take out a license to keep said dog, and was thereupon arrested upon a magistrate's warrant in an action of debt. Now, when the constable laid his hand on the shoulder of Mr. Meigs, he no doubt felt, with all his heart, the sentiment of England's most cynical poet:

> "Dogs or men!—for I flatter you in saying
> That ye are dogs, your betters far."

Judgment was duly or unduly rendered against Mr. Meigs; but he did not propose to submit to the outrage in dogged silence, but sued out a writ of *certiorari* in the supreme court. Mr. Meigs argued the cause for himself; and certainly his argument is convincing proof that there may be exceptions to the adage that he who has himself for his lawyer has a fool for his client.

"The dog," said Mr. Meigs," is liable to hydrophobia, and he loves mutton not wisely but too well, and his sublime devotion to his friends sometimes leads him to too intense distrust of strangers, most of whom he is disposed to treat as enemies. It is said that these characteristics give to municipalities the right to put him under stringent police regulations. Granted; but should not the regulations be adapted in some measure, at least, to prevent the occurrence of the evils? Now, pray, will a collar and insignia hinder the dog from biting men or chasing sheep, or impart to him the power to discriminate his master's friends from housebreakers?" This was indeed driving the nail home; but Mr. Meigs clinched it in the following sentences: "If the dog, on account of certain qualities of his nature, can be deemed to be a nuisance in cities, let him be so declared, under the power 'to prevent and remove nuisances.' This would be an intelligible proceeding; but it can not fail to be seen that the power to prevent and remove nuisances can not be a power to license and maintain them."

This was enough. The court took the same view of the question. A dog was property; was entitled to the same protection at the hands of the law as other property; might be taxed, it was true, and even muzzled at certain seasons of the year; but a man could not be fined as a culprit for owning a dog any more than for owning a horse. This was the substance of the decision.

We remember once, when a boy—to quote from the same noble poet, "O happy days, once more who would not be a boy?"—we remember once of belonging to a boys' debating club, in which on one occasion the question was, "Which has been of the greatest service to man, the sheep or the hog?" One smart youth, in the course of his argument for the sheep, related how the besieging host of Israel, before the city of Jericho, at an appointed signal, *beat upon their drums and sounded their ram's horns, and the walls of Jericho fell down.* "Now," said the beaming youth, "if it hadn't been for sheep, where would they have got them ram's horns?" This settled the question. The president of the club had no difficulty in deciding that *the sheep had it.*

In like manner Mr. Justice Humphreys, who delivered the opinion of the court in this case, as he warmed in his theme, discoursed as follows: "Not only has the dog been the subject of discussion in the courts, but his virtues have been celebrated in song. The wrongs done him have been touchingly described by poets, and hours have been occupied at the camp fires of huntsmen in narrating the achievments of favorite hounds. That the law has recognized the relations of property in any species of it

arises from the ascertained usefulness in some way to the wants of man of, that particular object or subject of property. The right to the property is recognized for its protection. History informs us of noble acts of fidelity and affection performed by some sentinel of the class under consideration. Our attention has been called by our brother Olin, to the event of so much interest to the world, and to the cause of freedom of opinion, and of the exercise of a conscientious faith, the rescue from the grasp of the enemies of toleration of William of Orange, on the morning of 12th of September, 1572, by the action of a little dog. The Spanish army under the command of Alva, invading the Netherlands, and the army of patriots under the command of the Prince, were encamped near the city of Mons. The plan was formed for the surprise of the camp of the patriots, and the capture or assassination of William, and for this purpose a band of six hundred disguised men were placed under the command of Julian Romero. The historian of the Rise of the Dutch Republic narrates that, 'near the hour of two o'clock in the morning, the boldest, led by Julian in person, made at once for the Prince's tent. His guards and himself were in profound sleep; but a small spaniel, who always passed the night upon his bed, was a more faithful sentinel. The creature sprang forward, barking furiously at the sound of hostile footsteps, and scratching his master's face with his paws. There was but just time for the Prince to mount a horse, which was ready saddled, and to effect his escape through the darkness, before his enemies sprang into his tent. His servants were cut down; his master of the horse and two of his secretaries, who gained their saddles a moment later, all lost their lives, and but for the little dog's watchfulness, William of Orange, upon whose shoulders the whole weight of his country's fortunes depended, would have been led, within a week, to an ignominious death.'"

This was argument enough to warrant the result reached, although the learned judge adduced other reasons. Judgment was gained for the detendant, no one dissenting; and Mr. Meigs went home,

> "Singing, singing, lustily singing,
> Down the road with his dog before,
> Like the Ritter of Nierestein."

Right of Husband to Wife's Personalty—Vested Rights of Husband.—In Jackson v. Jackson, *supra*, we saw that the court were able to expound a statute which granted alimony and dower to a wife out of the husband's property, in case of divorce, so as to make it grant alimony to the husband out of the wife's property. We now find a case, Kimbro v. First National Bank, in which the court felt obliged, in obedience to established precedents, to give effect to that noble and humane rule of the common law, that the husband owns the personal estate of the wife, and has the right to reduce it into possession. Accordingly they held that an act of Congress changing this rule would not be construed so as to affect the vested right of the husband to own his wife's property, by giving it a retroactive operation. It is, however, but just to the court to say that it could not have decided otherwise, had it desired to do so, without violating an established common law rule of property.

Liability of Carrier for Injury to Horses while in Charge of Agent of Owner.—Bowie v. Baltimore and Ohio R. R. Co., p. 94. Where the carried property consisted of race horses, accompanied by the agent of the owner, assisted by other persons in the employment of the owner, three of whom were race-riders of the horses, and who travelled with and took care of them, and where there was a difficulty in loading one of the horses on the car, such agent insisting on loading as he thought best, after having been requested by the railroad employees to place the horse under their control, the owner would not be entitled to recover for an injury to the horses sustained under uch circumstances.

There are a great many other interesting cases in this volume which we should like to notice; but book notices, like litigation, must stop somewhere Besides, most of these cases have been published in the Washington Law Reporter, and noticed in our summary of exchanges.

Legal News and Notes.

—HORACE BINNEY, the oldest member of the Philadelphia bar, is dead.

—DR. W. A. HAMMOND has retired from the editorial management of the Psychological and Medico-Legal Journal, and it will hereafter be a quarterly, conducted by Dr. Allan McLane Hamilton. McDivitt, Campbell & Co., of New York, are the publishers. The next number will be issued about the first of September. The June number, which has just arrived, contains a valuable paper by David Nicholson, M. D., Medical Officer to Her Majesty's Prison, Portsmouth, on the "Morbid Psychology of Criminals."

—IF we may credit our English exchanges, some of the English county judges are prone to cut up all sorts of antics. The Law Times says: "Neither solicitors nor barristers will consider the dignity of the profession added to by the spectacle of a county court judge, ordering into custody and imprisonment a solicitor of extensive practice and local influence, yet this scene has been enacted at the Bury County Court. Mr. Crompton Hutton, the learned Judge, recently fined Mr. Robert Crossland, one of the oldest solicitors practising in Bury (Lancashire), and a member of the municipal council, £5, with the alternative of seven days' imprisonment. Mr. Crossland refused to pay the fine, and he was conveyed to Lancaster Castle. The judge was of opinion that the solicitor in question unduly interrupted him when delivering a judgment, and was wanting in respect in subsequent observations to the court. In this we agree, but the action of the court we decline to justify, nor will the profession approve it. It is not by any means the first time the learned judge has committed persons for contempt."

—ENGLISH critics have had a great deal to say against the use of the word "reliable," which they declare to be of American coinage. We have, however, lately noticed its use in several instances by English judges and lawyers. Thus, in a digest of English patent cases, by Clement Higgins, M. A., F. C. S., Barrister-at-law, the learned author states in his preface, that his object is "to supply a *reliable* and exhaustive summary of the reported patent law cases," etc. Another word apparently of American coinage, and which is rapidly growing in favor is "theretofore." This word is frequently met with in American judicial decisions, particularly in those of the Western and Southern states, but it is not to be found in the dictionaries of Webster, Worcester or Richardson. We think, however, that we have met with it in a recent opinion of an English judge. There was no excuse in admitting "relable" into the language, since we already had a word, "trustworthy," which meant the same thing. But the lexicographers must open their doors and admit "theretofore," since the meaning of this word can not be expressed except by a circumlocution. "Previously" will not do; for the idea expressed by "theretofore" goes further back; it means *previous to previously*; that is, previous to some antecedent event already mentioned.

—HUSBAND AND WIFE—PREFERENCE.—A late decision in Maine affirms the late tendency of the courts, on the subject of preference, holding that a husband may prefer his wife before other creditors. The case was Joseph French, in equity v. Geo. H. Motley *et ux*, and the rescript is as follows:

"A husband may lawfully pay a *bona fide* debt due from him to his wife, for money of her own lent to him after marriage, by procuring with her assent, a conveyance to her by a third person of land paid for by him. When such conveyance is accepted by her in payment of such debt, she holds the land as if bought and paid for by herself, with her own money or means, and it is not liable to be taken as the property of the husband, to pay his debts contracted before such purchase.

"In the absence of proof sufficient to establish a common fraudulent intent and design on the part of the husband and wife, his other creditors can not complain of his preference to discharge his debt to her, rather than them. The fact that the debt to his wife had subsisted more than six years prior to such payment, and that the note originally given for it is barred by the statute of limitations, is not conclusive evidence of a want of good faith. The creditor fails to show to the satisfaction of the court, that the wife should not be regarded as the *bona fide* purchaser, for value, of the property conveyed to her.

"Mere suspicion arising out of the relation of husband and wife, will not suffice for that purpose."

—CEREMONY IN THE ADMINISTRATION OF JUSTICE.—At the recent assizes at Northampton, England, Mr. Justice Mellor is reported to have said, addressing the gentry of the county, who had assembled to serve as grand-jurymen: "It was also important in this respect—he regretted to see in many counties—and he was not sure he might not say the same of this—the decay of those matters of importance which ought to attend the reception of the representatives of her Majesty's commissioners, those circumstances of state, which in his judgment entered very largely into the spirit of that which was known as allegiance to law, and of which they were but imperfect judges. This was a matter not to be lost sight of; and he doubted whether allegiance to the law would remain intact as it was at present, if the cicumstances of solemnity and state should unfortunately throughout the country disappear. It was of the utmost importance that those who had a stake in the country, as it was called, or who possessed the property of the country in great measure, should do nothing calculated to diminish the allegiance to the law. This was not his opinion only; he had heard it stated by others who took a more philosophical view of the matter then a judge could do; it was their opinion that it was of essential importance to keep up those circumstances of solemnity and state attending the administration of criminal law. He was convinced that they owed the greatest advantage to the solemn administration of justice, particularly by the judges, who were commissioned by her Majesty to represent her, and, therefore, it was that he regretted when he saw anything that was calculated to lessen that respect. He did not say this in any narrow spirit. There were a number of counties in which the same thing was manifested,"